IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972
No. _____

ROBERT BUTLER,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Robert Butler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported as United States v. King, 472 F.2d 1

(9th Cir. 1973). A copy of the opinion is appended to this petition.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1972, and the opinion was amended upon denial of rehearing on February 7, 1973. On March 8, 1973, Mr. Justice Douglas, as circuit justice for the Ninth Circuit court of appeals entered an order extending time to file petition for writ of certiorari to and including April 7, 1973 (no. A-925). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, according to the dictates of Giglio v. United States, 405 U.S. 150 (1972), a judgment of conviction must be reversed because of government counsel's misrepresentations to a federal trial court concerning his intentions to dismiss an indictment against a key witness informer, thus leading the court erroneously to rule the defense could not argue the indictment against the informer would be dismissed and thereby successfully precluding information relevant to the informer's credibility from reaching the jury.

2. Whether, under Napue v. Illinois, 360 U.S. 264 (1959), a judgment of conviction must be reversed because the government failed to disclose promises made to the principal witness informer in exchange for his testimony, failed to correct false testimony that no promises had been made and thereby prevented the jury from receiving information relevant to the informer's credibility.

3. Whether, pursuant to Dutton v. Evans, 400 U.S. 74 (1970), and California v. Green, 399 U.S. 149 (1970), the Confrontation Clause of the Sixth Amendment was violated by the admission of writings, bearing scant indicia of reliability but contended by the government to be ledgers of drug transactions, warrantlessly seized from a garage footlocker of an alleged conspirator who fled prior to trial and thus could not make the alleged statements under oath, could not be subjected to cross-examination and of course had no demeanor for the jury to consider.

4. Whether, in the circumstances now under review, rules of evidence applicable in federal criminal prosecutions, including the conspirator exception to the rule against hearsay evidence, preclude for want of foundation and authentication admissibility of writings (contended to be "ledgers" of drug transactions) found in a garage footlocker of an absent co-defendant where the government made no effort to authenticate the documents through expert

comparison with presumably available handwriting samples, where the government sought to arrest another (nonconspirator) on the basis of handwriting analysis, where no evidence was adduced to show the writings were made by an alleged conspirator during the course of and in furtherance of the alleged conspiracy, where the writings at best were notations of past fact, where the contents of the writings could not be construed as peculiarly within any alleged conspirator's knowledge, and where there was an abject absence of indicia of reliability to the writings attributed to an absent codefendant not available for cross-examination.

(a) Whether the error of admitting these writings attributed to an absent alleged conspirator could properly be cured merely through the trial court's general instruction on conspirator hearsay.[1/]

[1/] Clearly this case presents additional questions of substance. As counted by the court of appeals, "[a]ppellants together charge sixty-two errors in this appeal." United States v. King, 472 F.2d 1, 4 (9th Cir. 1973). Pursuant to Rule 46 of the Rules of this Court and Rule 28(i), Fed. R. App. P., petitioner Robert Butler adopts all applicable arguments advanced in the related case of Ted Dean Butler v. United States, no. 72-1213, in which a petition for writ of certiorari was docketed on March 6, 1973.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property without due process of law; . . ."

The Sixth Amendment of the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

STATEMENT

1. Proceedings Below.

Petitioner Robert Butler was charged with two counts of conspiracy in a fourteen count indictment (C.D. Cal. no. 5902)[R. 63-82].[2/] Proceedings on the indictment were

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[2/] The designation "R" refers to the record on appeal whereas 1 R.T. will refer to the reporter's transcript of the dangerous drugs trial and 2 R.T. will denote the transcript of the heroin conpsiracy trial. Such designations will be followed by appropriate page numbers.

conducted in two trials. On June 29, 1970, one jury found petitioner guilty as charged of a dangerous drugs conspiracy, see 21 U.S.C. §331(q), beginning June 15, 1969, and continuing until April 22, 1970, in violation of 18 U.S.C. §371 [R. 63-67; R. 358]. On July 9, 1970, a second jury returned a verdict of guilty under former 21 U.S.C. §174, concerning an alleged heroin conspiracy commencing October 24, 1969, and continuing until April 22, 1970, the date of the return of the indictment [R. 71-73; R. 377]. On August 17, 1970, petitioner Robert Butler was committed to the custody of the attorney general for a term of two years on the drug conspiracy count and for a term of seven years on the heroin conspiracy count, the terms to be served concurrently [2 R.T. 887]. Having posted bond pending appeal in the amount of $10,000, petitioner resides at 6318 Wooster Avenue, Los Angeles, California 90056. On August 24, 1972, the Ninth Circuit court of appeals affirmed the judgments of conviction, rejecting perhaps thirty six assignments of error made on behalf of petitioner Robert Butler.[3/] The opinion of the court of appeals was amended upon denial of rehearing on

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[3/] See Appellant's opening brief, 9th Cir. no. 71-1029, pages 1-5; cf. note 1 supra. Petitioner's counsel before this Court is different from his trial and appellate counsel.

February 7, 1973, and a copy of the opinion is appended to this petition.

2. Jurisdiction.

This Court's jurisdiction of course rests upon 28 U.S.C. §1254(1). Appellate jurisdiction was vested in the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §§1291 and 1294, as well as Rule 4(b) of the Federal Rules of Appellate Procedure; notice of appeal from a judgment of the United States District Court for the Central District of California [R. 438-39] was seasonably filed on August 17, 1970 [R. 445].

3. Facts.

Evidence concerning the two alleged conspiracies of which petitioner Robert Butler has been convicted is aptly summarized in the appendix in a light blindingly favorable to the government, United States v. King, supra, 472 F.2d at 9-11 n. 5. In sum, a drug entrepreneur named John Durden had the misfortune of choosing a federal agent as the prospective purchaser of some 120,000

dangerous drugs 4/ on September 9, 1969 [1 R.T. 662, 1114-15, 1118; 2 R.T. 177]. Three days later young Durden was again arrested, this time in possession of some 140,000 dangerous drugs [1 R.T. 1127-28, 1133]. As is not uncommon in drug law enforcement, 5/ Durden soon agreed to help the government ensnare prospective violators of the various drug laws [e.g., 1 R.T. 1236-37; 2 R.T. 180-81]. It was not difficult for Durden to gather evidence against Joe and Leo Lovato, both in the drug wholesale business; indeed, Durden more or less worked as their distributor [e.g., 1 R.T. 621, 649], selling drugs "to anybody that would buy them." [1 R.T. 896.] But the Lovatos left Los Angeles prior to trial, leaving only

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4/ There were approximately 70,000 capsules of sodium secobarbital, commonly branded seconal (a red capsule) and thus referred to as "reds." [1 R.T. 1207-08.] The remaining 50,000 consisted of tablets of amphetamine sulphate, a white powder, bearing the jargon name of "white." [1 R.T. 1210, 1333, 1724.]

5/ See, e.g., Jones v. United States, 266 F.2d 924, 928 (D.C. Cir. 1959)(Bazelon, J.); Comment, 81 Yale L.J. 703, 712-13 (1972).

a sextet of so-called conspirators[6] to be convicted on the dangerous drugs count and only petitioner Butler and an unrelated person named Ted Butler to be condemned as heroin conspirators. Interestingly, not one of the six members of the alleged dangerous drugs conspiracy (including petitioner) was ever found to possess so much as an aspirin tablet. Equally curious are convictions as heroin conspirators without any heroin.[7]

6/ The court of appeals appears to have held as a matter of law that the facts allowed an inference of only one dangerous drugs conspiracy, finding no error in the district court's refusal to instruct the jury as to the possible existence of separate conspiracies. United States v. King, 472 F.2d 1, 12 (9th Cir. 1973). To find a single conspiracy among mere buyers and sellers, see, e.g., United States v. Varelli, 407 F.2d 735 (7th Cir. 1969) (and authorities cited), the court in the case at bar rejected Kotteakos v. United States, 328 U.S. 750 (1946), and instead relied upon Blumenthal v. United States, 332 U.S. 539 (1947).

7/ In recounting the factual setting the court of appeals depicts a November 3, 1969, discussion of heroin between petitioner and Joe Lovato in the presence of informer Durden. According to the court, "[a] small purchase was made by Robert Butler. . . ." United States v. King, 472 F.2d 1, 11 n. 5 (9th Cir.

The evidence of the alleged conspiracies consisted almost exclusively of testimony of drug-entrepreneur-turned-informer Durden, tape recordings of conversations between Druden and various people[8] and some writings seized from the garage of absent codefendant Leo Lovato. United States v. King, supra, 472 F.2d at 8, 9-11 n. 5.

7/ (continued from previous page)

1973). But a closer examination of the record reveals error in the implicit suggestion that Durden witnessed a purchase of heroin. His direct testimony shows he was at best relating remarks he thought might have been made that evening [2 R.T. 53], and on cross-examination Durden testified that he had never even seen heroin (at least prior to the government's use of him) [2 R.T. 190, 207-08, 212] and that he had never seen petitioner Robert Butler use heroin [2 R.T. 213].

8/ The recordings were of telephone conversations made by Durden from the Los Angeles office of the federal bureau of narcotics and dangerous drugs [2 R.T. 194, 209, 221].

Following Durden's September arrests on federal charges,[9] agents sought his help as an informer [e.g., 1 R.T. 1133, 1236]. It appears that on October 24, 1969, six weeks after the arrests, arrangements for Durden's "cooperation" were finalized at the office of his attorney [1 R.T. 1236-37; 2 R.T. 180-81].[10] Pursuant to the agreement Durden's attorney instructed him to "do whatever I could to work with the Government." [2 R.T. 182.] Agent Robert Sternaman and three other

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9/ Durden also had problems with California courts. At the time he made the deal with the government at bar, he was awaiting sentencing in state court on theft and forgery convictions [1 R.T. 945]. Through the intercession of the federal narcotics bureau, Durden was released on probation so that he could work as an informer [1 R.T. 799, 1276-77, 1283]. Simiarly, a pending state felony prosecution was continued until Durden's federal "cooperation" could be completed [1 R.T. 853-54].

10/ The date of the meeting appears to coincide with the commencement of the alleged heroin conspiracy [R. 72]. Heroin was unknown to Durden [2 R.T. 212] until his informer duties required him to attempt to involve others with the drug and gather evidence [2 R.T. 410].

federal agents negotiated the deal with Durden and Durden's lawyers [2 R. T. 181-83, 409-11].

In his testimony before the district court at the two trials, Durden recalled intimate details of numerous conversations with alleged conspirators but could not remember what had been said at the meeting which confirmed his informer deal [2 R. T. 183]. Simply stated, informer Durden denied that any promises of anything had been given in exchange for his extensive cooperation [1 R. T. 796, 893, 993, 2 R. T. 184, 190-91, 238].

With regard to the impending dismissal of the federal charges against him [Appendix B], informer Durden asserted he had no hope at all that he would not be prosecuted [2 R. T. 184]. When asked, for example, whether his work with the agents was due to hopes of leniency in his own case, Durden answered "[n]o," then said "possibly." [2 R. T. 233.] Interrupting cross-examination, the district court questioned informer Durden:

> "You did it with the hope that whatever court it is that has your case would consider it, isn't that right?" [2 R. T. 233.]

Durden answered affirmatively. The trial court further inquired:

> "Has anyone ever told you that any case you have pending in the

federal court will be dismissed?"
[2 R.T. 238.]

Informer Durden told the court and jury that "nobody has." [2 R.T. 238.]

As Durden denied ever receiving any promises or even hoping for a dismissal, the government prosecutor did not attempt to correct the testimony. Nor did the agent in charge of the case, one Sternaman, suggest that Durden might not be telling the truth. Instead, at the first trial, government counsel built his case on redirect examination by having informer Durden flatly deny any promise of any aid from any member of the government [1 R.T. 993]. At the second trial, the scene was substantially the same. On redirect examination, government counsel asked informer Durden, "have I made any promises to you in this case?" [2 R.T. 242.] Durden denied any promises.[11/]

When the defense sought to argue that Durden's credibility was questionable because his testimony had been given in exchange for

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11/ Interestingly, government counsel's protestations of no promises conflicted with informer Durden's admissions that government counsel had at least promised to bring his cooperation to the attention of the judge before whom Durden would appear [2 R.T. 239, 242].

dismissal of the federal charges as well as other benefits, government counsel announced:

> "May I state for the record I do not intend to dismiss the case against John Durden." [1 R.T. 1938.]

Based upon such assurances from the assistant United States attorney with total authority over Durden's case [1 R.T. 1937], the district court ruled Durden's credibility could not be attacked by argument that the indictment would be dismissed [1 R.T. 1968-69].

Although government counsel gave such strong assurances to the court, it appears that he had previously said in private conferences that he intended to dismiss the charges [Appendix B].[12/] His previously stated intention was borne out on September 29, 1970, six weeks after sentencing in the instant matter, when the government successfully moved the district court to

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12/ The affidavits included in the appendix are of course not within the trial record. However, where, as here, the integrity of administration of justice is at stake it is appropriate to consider affidavits relating nonrecord events. United States v. Shotwell Mfg. Co., 355 U.S. 233, 242-43 (1957); see, e.g., Mesarosh v. United States, 352 U.S. 1 (1956); Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 124-25 (1956); cf. Kolod v. United States, 390 U.S. 136 (1969).

dismiss the charges against informer Durden.[13] During oral argument before the court of appeals, the same assistant United States attorney announced a watered-down version of his representation not to dismiss the case against Durden. He responded to the appellate court's probe by alleging that his actual intentions were to reduce the charges against Durden to an unnamed misdemeanor offense [Appendix B]. Assuming this to have been his intention, he had not disclosed it to the district court; moreover, even to reduce the felony charges would have required dismissal of the original case and filing of a new information [Appendix B]. Nevertheless, as observed above, government counsel had assured the court that he had complete authority over the Durden matter and that dismissal would not be forthcoming [1 R.T. 1937-38, 1968-69].[14]

13/ This Court may take notice of the district court files in United States v. John Durden, C.D. Cal. nos. 4762, 4847, but, because the government has never denied the fact, the court of appeals proceeded on the correct assumption that "the indictment against Durden was dismissed by the government." United States v. King, 472 F. 2d 1, 6 n. 2 (9th Cir. 1973).

14/ The misrepresentations to the district court led to the ruling that the defense could not argue the case against Durden would be dismissed. During the discussion of the matter, the trial court said: "Oh, yes, you can argue what his

Other than the Durden testimony and recordings, primary evidence of the alleged conspiracies consisted of writings seized shortly after the arrest of absent alleged conspirator Leo Lovato, as discussed in part III of the opinion of the court of appeals. United States v. King, supra, 472 F.2d at 7-11. The writings were found in an unlocked footlocker in the garage of Leo Lovato's residence [2 R.T. 323, 339], and were admitted over plenary objection at both trials against petitioner Robert Butler [1 R.T. 1548, 1859, 2063; 2 R.T. 326]. 15/

14/ (continued from previous page)

expectations are. But that is a lot different [from] arguing that it is going to be dismissed, [counselor], as you know so well." [1 R.T. 1969.] The great difference observed by the trial court is virtually nonexistent in the eyes of the court of appeals. United States v. King, 472 F.2d 1, 6 (9th Cir. 1973).

15/ Objections to the admissibility of the garage papers were made on numerous grounds throughout the proceedings [e.g., 1 R.T. 1170, 1173-81, 1196-97, 1318, 1541, 1667, 1857; 2 R.T. 323-26]. As pertinent to this petition, the writings were challenged for lack of foundation and authentication [e.g., R. 386; 1 R.T. 1175, 1177-82; 2 R.T. 326], as inadmissible hearsay [e.g., 1 R.T. 1170 et seq.], and as violative of the Confrontation Clause [e.g., 1 R.T. 1858].

The record discloses that after arresting Leo Lovato on February 6, 1970, federal agents searched the Lovato garage 16/ and seized what government counsel called "the

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16/ The court of appeals relates that following the Lovato arrest, "in response to inquiry about dangerous drugs, [Lovato] pointed out to the officers the location in his attached garage where the drugs could be found." United States v. King, 472 F.2d 1, 8 (9th Cir. 1973). As viewed by the court of appeals, "Lovato in effect identified the documents as his own by directing the agents to his 'business storeroom' where they were found with his contraband merchandise." Id.

It should be observed that the contraband merchandise did not include heroin hydrochloride, the substance allegedly involved in one conspiracy of which petitioner Robert Butler has been convicted [2 R.T. 340].

More importantly, the garage papers could not be deemed to have been identified by Leo Lovato as his own. Lovato's arrest had been effected and the purported identification was not admissible under the conspirator exception to the rule against use of hearsay evidence. See Fiswick v. United States, 329 U.S. 211, 217 (1946). Nor may the hearsay "identification" be viewed as an admission by Lovato; Lovato did not stand trial.

two ledger books," [2 R.T. 324], containing "just writing, names, numbers." [2 R.T. 325.] One of the names written in each document was "Bob." [2 R.T. 343-44.] As stated by the court of appeals:

> "The government failed to present any proof that the writings were in the handwriting of any of the appellants, or of when the writings were made." United States v. King, supra, 472 F.2d at 7.

Nor was there any evidence that the garage papers were in the handwriting of Leo Lovato, "who fled before the trial . . . ." Id. at 6. 17/

Although the government chose to offer no expert testimony concerning the handwriting on the garage papers, agent Sternaman testified that he had previously appeared before a federal commissioner and had made the following statement under oath:

> "'I acquired samples of Barbara Lovato's handwriting and I have been informed by a Los Angeles

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17/ There was no expert handwriting analysis offered by the government, despite the appearance of Leo Lovato's signature on the second page of the present record [R. 2].

> Sheriff's Office handwriting expert that many of the entries referring to the sale of dangerous drugs were in fact written by Barbara Lovato.'" [1 R.T. 1713-14.]

Leo Lovato was indicted along with petitioner Robert Butler but failed to appear for trial; Barbara Lovato was not alleged to be a member of either conspiracy.

Finding no error in the admission of the garage papers, the court of appeals thought the circumstances of the location of the papers and the apparent custody of the papers by Leo Lovato provided a "reliable index of genuinesness." United States v. King, supra, 472 F.2d at 8, to the extent that the absent Leo Lovato must have authored the materials. The court of appeals then relied upon the standard conspiracy hearsay instruction to support its view that the jury found the absent Lovato to be a conspirator and to have written the notations[18/] during the course of and in furtherance of the conspiracies. Id. at 9, 11.

18/ The notations are illustrated in the appellate opinion, United States v. King, 472 F.2d 1, 8 (9th Cir. 1973), as including "'Pd $250 to driver' and, Pd in full.'" There is no attempt to explain how these narrative statements of past events, cf. id. at 5, could have made in furtherance of either conspiracy.

REASONS FOR GRANTING THE WRIT

1. A JUDGMENT OF CONVICTION MAY NOT BE SUSTAINED WHERE GOVERNMENT COUNSEL MISREPRESENTS TO A FEDERAL COURT HIS INTENTIONS TO DISMISS A CASE IN EXCHANGE FOR THE "COOPERATION" OF THE GOVERNMENT'S PRINCIPAL WITNESS.

This unfortunate case involves serious disregard "for the honor of administration of justice." Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124 (1956). A zealous prosecutor, acting perhaps from excessive "earnestness and vigor," Berger v. United States, 295 U.S. 78, 88 (1935), secured criminal convictions but utilized methods which are beyond what the nation can "afford to abide." Mesarosh v. United States, 352 U.S. 1, 14 (1956). As the conduct of government counsel at bar pales in comparison to that condemned in Giglio v. United States, 405 U.S. 150, 154 (1972), the judgment cannot stand.

Here, as in Giglio, without the informer's testimony there would have been "no evidence to carry the case to the jury." Giglio v. United States, supra, 405 U.S. at 154. Unlike Giglio,

however, the instant case does not involve a negligent nondisclosure of a promise not to prosecute informer Durden. Instead the case presents a government prosecutor's representation to a federal trial judge that the case pending against the informer would not be dismissed. However, government counsel had stated previously that he would dismiss the case against informer Durden in exchange for cooperation [Appendix B]. 19/ And shortly after the proceedings below had been completed the charges against informer Durden were in fact dismissed.

19/ The affidavits in the appendix at the very least "cast the darkest shadow upon the truthfulness" of the government in the present case. United States v. Shotwell Mfg. Co., 355 U.S. 233, 241 (1957). Standing alone, the affidavits are sufficient to call for resolution of the charges against the government. Id. at 242-43. Rather than remand for an evidentiary exploration of the extent of the fraud, it would appear that the affidavits should be considered in conjunction with the conduct disclosed by the record; the impurity of the proceedings is sufficiently clear as to call for outright reversal. Hopefully, the government's posture before this Court will feature the kind of "commendable candor" from the Solicitor General which enabled disposition of Mesarosh v. United States, 352 U.S. 1, 7 (1956).

Despite the record, the affidavits and the admission at oral argument, the court of appeals upheld the methods employed by government counsel. Rejecting reliance on Giglio v. United States, supra, the court construed Giglio as applicable only if "a promise of dismissal had definitely been made to Durden and that this alleged promise was known to the prosecution." 20/ United States v. King, supra, 472 F. 2d at 6. Under this view of Giglio, (a) the government may hide behind the proverbial wink of the eye to an informer (or a direct promise

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20/ The court of appeals also said: "The government has at all times denied such a promise, and there is no evidence in the record to the contrary." United States v. King, 472 F.2d 1, 6 (9th Cir. 1973). This is ridiculous. The face of the record cannot be determinative of false evidence questions or the issues would be foreclosed from inquiry. Moreover, in the instant case, the government has not attempted to refute the charges of misrepresentations to the trial judge. Ordinarily one finds affidavits as to the facts. See, e.g., Giglio v. United States, 405 U.S. 150 (1972); United States v. Perisco, 330 F.Supp. 1077, 1090-91 (E.D.N.Y. 1972). The absence of affidavits is significant. Cf. Favor v. Henderson, 348 F.Supp. 423, 425 (W.D. La. 1972) (Dawkins, J.). Here, the denial by the government of the deal to dismiss Durden's case is the challenged misrepresentation; it may not be construed as the representation to refute the allegations of misrepresentation.

to his counsel) and insist that the informer personally had not been promised dismissal, and (b) the government may make misrepresentations to a federal court regarding intentions to dismiss a case against an informer if there is no evidence of record that these intentions have been communicated to the informer. 21/

Clearly the decision of the court of appeals sanctions procedures violative of basic concepts of integrity and due process; it must accordingly not be allowed to stand as a license for future sophisticated Giglio violations.

21/ The Texas Court of Criminal Appeals has recently considered a case where there was no showing the prosecution communicated its promises of dismissal to the informer personally. The majority of the court found arrangements made with the informer's counsel to be within the scope of and discovery mandate of Giglio v. United States, 405 U.S. 150 (1972). See Burkhalter v. State, ___ S.W.2d ___ (Tex. Ct.Crim.App. 1973), in 12 Crim. L.Rptr. 2547 (March 28, 1973), cf. United States v. Mele, 462 F.2d 918, 925-26 (2d Cir. 1972) (Mr. Justice Clark).

2. THE DECISION OF THE COURT OF APPEALS SANCTIONS USE OF FALSE EVIDENCE IN A FEDERAL COURT ON A RECORD VIRTUALLY IDENTICAL WITH THAT OF NAPUE V. ILLINOIS, 360 U.S. 264 (1959).

Here, not only did the government violate its "duty of candor toward the defendant," United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972) (Duniway, J.), but moreover the government indeed "labored to keep vital information from the defense, the trial judge and the jury," United States v. Mele, 462 F.2d 918, 924 (2d Cir. 1972) (Mr. Justice Clark). Throughout the proceedings below the government's principal witness denied the existence of any promises, consideration or aid in exchange for his extensive cooperation and testimony. This of course was patently false evidence. It now appears that a multitude of assistance, including dismissal of a pending federal case, was in fact given by the government.

Instead of correcting Durden's false testimony that no promises had been made, the government in the case at bar elected to mislead the court and jury even further. 22/ It was

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22/ Thus the case is not merely one "of acquiescence and knowledge," but of an intentional failure "to correct the testimony. . . ."

on redirect examination of informer Durden, as in Napue v. Illinois, 360 U.S. 264, 270-71 (1959), that government counsel elicited the false evidence that the principal witness had not "in any way been promised any help or aid from the Government or any member of the Government for this testimony[.]" [1 R.T. 993.][23/] There is no interpretation of these words which would allow a conclusion that the testimony was not false, and thus within the clear condemnation of Napue. The false testimony affected "the credibility of the witness," Napue v. Illinois, supra, 360 U.S. at 269, was "important" to the government's case, id. at 270, and, as Durden was the only witness

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22/ (continued from previous page)

See Dale v. Williams, 327 F.Supp. 381, 383 (E.D. Pa. 1971) (Weiner, J.); see also United States v. Harris, 462 F.2d 1033, 1034-35 (10th Cir. 1972); Imbler v. Craven, 298 F. Supp. 795, 805-06 (C.D. Cal. 1969) (Ferguson, J.), aff'd, 424 F.2d 631 (9th Cir.), cert. denied, 400 U.S. 865 (1970). The use of false evidence simply has "no legal justification." Id., 298 F.Supp. at 806.

23/ The words were those of the government prosecutor. By use of the phrase "in any way," government counsel appears to have included the possibility that the promise of dismissal had been communicated to Durden by his attorney rather than by a government agent. See note 21 supra.

of significance, the false evidence cannot be deemed to have "not in any reasonable likelihood have affected the judgment of the jury." Id. at 271; accord, e.g., Giglio v. United States, supra, 405 U.S. at 154-55. Durden's incessant false denials of governmental aid for his "cooperation," coupled with the government's insistence upon bolstering the false testimony of its key witness informer, clearly "may have had an effect on the outcome of the trial. Accordingly, the judgment below must be reversed." Napue v. Illinois, supra, 360 U.S. at 272. 24/

24/ The court of appeals was oblivious to the problem of promises other than one of dismissal of the federal case made directly to Durden. See note 20 supra and accompanying text. The deal with Durden and Durden's attorneys appears to have included not only dismissal of the case arising from Durden's attempted sale of 120,000 dangerous drugs and his possession three days later of 140,000 dangerous drugs [pages 7-8 supra], but also a recognizance release prior to finalization of informer arrangements [1 R.T. 793-94], probation instead of prison on a pair of state felony convictions [note 9 supra], indefinite continuances of a pending state felony prosecution [note 9 supra], and perhaps other considerations which remain the secret of Durden and the government. Cf. note 5 supra (and authorities cited).

3. WITHIN THE PRESENT CONTEXT THE CONFRONTATION CLAUSE PRECLUDES THE ADMISSIBILITY IN A CONSPIRACY PROSECUTION OF WRITINGS FOUND IN A GARAGE FOOTLOCKER SUBSEQUENT TO THE ARREST OF AN ALLEGED CONSPIRATOR WHO FLED PRIOR TO TRIAL.

To find evidentiary support for the conspiracy convictions, the court of appeals related informer

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24/ (continued from previous page)

In considering the instant use of false evidence and that condemned in Napue v. Illinois, 360 U.S. 264, 270-71 (1959), it should be observed that the only factual distinction is the absence of allegations made by the prosecutor himself of promises of dismissal given directly to the informer, see id. at 266-67. But the other promises which were learned despite concealment, coupled with circumstances leading ineluctably to the conclusion that both the prosecution and Durden knew the no dismissal testimony was false, render the case indistinguishable from Napue in thrust. Moreover, here the false evidence and the misrepresentations resulted in the trial court's erroneous ruling that impending dismissal of charges could not be argued to the jury although such information was of course "relevant to [Durden's] credibility and the jury was entitled to know of it." Giglio v. United States, 405 U.S. 150, 155 (1972).

Durden's testimony and further stressed that the writings found in the footlocker in Leo Lovato's garage "provided additional strong circumstantial evidence." United States v. King, supra, 472 F.2d at 11 n. 6; see id. at 8. The writings, made at unknown times by unknown persons, id. at 7, were described generously (to say the least) as "two ledgers," id. at 8, containing "records of a drug business." Id. 25/

Whoever made the writings in question clearly was a witness against petitioner Robert Butler at both trials. Thus involved is petitioner's constitutional right of confrontation under the Sixth Amendment. See, e.g., Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970), Douglas v. Alabama, 380 U.S. 415, 419-20 (1965). Mr. Justice Rehnquist has recently summarized the requirements of the Confrontation Clause:

> "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though

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25/ Despite this characterization there has been no suggestion the writings could possibly qualify for admission as business records within the purview of 28 U.S.C. § 1732.

> there is no confrontation of the declarant,' [citation], and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' [citation]." Mancusi v. Stubbs, 408 U.S. 204, 213 (1972).

The Court has sustained the admission of prior-recorded testimony, for example, where opportunity to cross-examine and counsel's use of that opportunity provided the requisite indicia of reliability and basis for truth evaluation. Id. at 216.

No decision of this Court could extend to sanction admission in the instant case of writings found in the garage of an alleged conspirator who was never available for cross-examination. The writings were without any of the indicia of reliability ordinarily in question for purposes of the Confrontation Clause. See California v. Green, supra, 399 U.S. at 158. Though the admission of the writings did not have the dramatic impact of Douglas v. Alabama, supra, 380 U.S. at 419-20, the effect was equivalent to the prosecution's reading a piece of paper and saying it was the confession of Leo Lovato. Unlike Dutton v. Evans, supra, 400 U.S. at 87, see id. at 90 (Blackmun, J., concurring), the confrontation violation in the present case was not of peripheral significance or harmless. As acknowledged by the court of appeals, the writings were essential to conviction.

The decision of the court of appeals may not be allowed to remain as precedent for the proposition that facts may be found from pieces of paper featuring writings made by someone at an unknown time who presently is not in court to testify to the facts. 26/

4. WRITINGS FOUND IN A GARAGE FOOTLOCKER MAY NOT PROPERLY BE RECEIVED AS EVIDENCE IN A FEDERAL COURT WITHOUT PROOF OF AUTHORSHIP OTHER THAN THE CIRCUMSTANCES SURROUNDING THE SEIZURE.

The garage papers were admitted over objection for want of foundation and authentication. To sustain the admission of writings introduced without proof of handwriting which

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26/ Business records or official records obviously bear sufficient indicia of reliability and basis for truth evaluation as to be distinguishable from garage papers.

It should be observed that the court of appeals failed to focus upon the denial of confrontation though the objection was properly raised below and argued on appeal.

was available [R. 2], the court of appeals found that the location of the papers in the Lovato footlocker was sufficient to assure that absent alleged conspirator Leo Lovato was the creator of the writings. To support the conclusion the court of appeals cited two precedents where the alleged writer was in court to refute the allegation of authorship. 27/ The court further found itself "in agreement with Professor McCormick," United States v. King, supra, 472 F.2d at 8, quoting a suggestion from the 1954 work which does appear in the present edition. 28/

27/ The court relied upon the factually inapposite case of United States v. Sutton, 426 F.2d 1202 (D.C. Cir. 1969), and placed special emphasis upon the rather obscure and nonreasoned People v. Ramsey, 83 Cal.App.2d 707, 189 P.2d 802 (1948), overruled on other grounds, People v. Brown, 49 Cal.2d 577, 584 (1948).

28/ See C. McCormick, Evidence 552 (2d ed. 1972). The present edition incorporates the suggestion as applicable in circumstances such as those of United States v. Sutton, 426 F.2d 1202 (D.C. Cir. 1969). There is no construction by which the theory might be applied to allow the admissibility of the instant garage papers.

The decision of the court of appeals ignores rules of evidence traditionally applicable to admissibility of documents. Particularly in light of the fact that the government could have properly authenticated the documents (if they were in the handwriting of Leo Lovato), the failure of foundation and authentication is not sufficiently justifiable to warrant the new rule of evidence.

CONCLUSION

For the reasons stated, petitioner Robert Butler respectfully prays that the petition for writ of certiorari be granted and that the judgment of the court of appeals be reversed.

Respectfully submitted,

LAW OFFICES OF
BARRY TARLOW

By: Barry Tarlow

Attorneys for Petitioner

APPENDIX A

FEDERAL REPORTER

VOLUME 472, SECOND SERIES



UNITED STATES of America,
Plaintiff-Appellee,
v.
Charles KING, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Manuel RODRIGUEZ, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Robert BUTLER, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Ted Dean BUTLER, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Vincent ARIAS, Defendant-Appellant.

Nos. 71-1256, 71-1088, 71-1929 to 71-1931.

United States Court of Appeals,
Ninth Circuit.

Aug. 24, 1972.

As Amended on Denial of Rehearing
Feb. 7, 1973.

Defendants were convicted in the United States District Court for the Central District of California, E. Avery Crary, J., of conspiring to possess for sale and to sell dangerous drugs, and two of such defendants were also convicted of conspiracy to conceal, transport and sell heroin, and all defendants appealed. The Court of Appeals, Wallace, Circuit Judge, held, inter alia, that where evidence was overwhelming that a dangerous drug conspiracy and a heroin conspiracy did exist, and a majority of testimony, including tape recorded evidence in both drug cases could easily have supported a finding by jury that defendant in whose garage ledgers and other papers were found was a member of each of conspiracies, and contents of ledgers and other papers appeared on their face to have been written during course of conspiracy and in furtherance of objects of conspiracy, such evidence, coupled with independent evidence of each defendant's participation in conspiracy, was sufficient to allow jury to consider ledgers and other papers taken from defendant's footlocker as to each defendant.

Affirmed.

1. Criminal Law ⇐394.5(3)

There was no error in introducing various taped telephone conversations that took place between defendants and a cooperating, unindicted coconspirator, who gave his consent to taking of recordings which were made by connecting his telephone with a tape recorder.

2. Criminal Law ⇐641.3

There is no right to counsel while one is committing a crime.

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1. Criminal Law ⇐393(1), 641.2

Rights of defendants to counsel and to be free from self-incrimination were not violated by unseen and unheard monitoring of telephone conversations that took place between them and a cooperating, unindicted coconspirator, notwithstanding claim that defendants had a right to be warned of their right to counsel before they spoke, in that coconspirator was calling them at request of government narcotics agents, where, at time of recorded telephone calls, defendants had not been indicted and were not represented by counsel, nor had investigation reached "accusatory" phase, and defendants were clearly suspected of criminal activity and were being investigated.

4. Criminal Law ⇐361(1), 433

While it was true that a few of statements made by a cooperating, unindicted coconspirator on various taped telephone conversations that took place with defendants contained narrative statements of events not strictly in furtherance of conspiracy, where none of such statements could reasonably be said to be so prejudicial as to constitute reversible error, it was not improper to allow jury to hear tapes of and simultaneously read transcripts of coconspirator's half of recorded conversations, notwithstanding claim that a great mass of prejudicial hearsay was thereby allowed into evidence.

5. Criminal Law ⇐707

Although a cooperating, unindicted coconspirator was asked whether in fact a pending indictment against him was going to be dismissed in consideration of his testimony against defendants, to which question he answered "No," testimony was not a basis for proving claim that, by allowing such testimony to go uncorrected, prosecutor was acquiescing in knowing use of false evidence, where claim was based on premise that a promise of dismissal had definitely been made to coconspirator and that alleged promise was known to prosecution, but government at all times denied such a promise, and there was no evidence in record to contrary.

6. Criminal Law ⇐720(5)

Notwithstanding claim that trial court committed reversible error by not allowing defendant to argue to jury that testimony of a cooperating, unindicted coconspirator was not worthy of belief since he had been promised a dismissal if he testified against defendants, where trial court stated that it would allow counsel to argue that coconspirator had great expectations of a dismissal as any one in a similar position would have, it was not unduly restrictive to prevent counsel from arguing that dismissal was in fact forthcoming.

7. Criminal Law ⇐394.5(2)

Defendants lacked standing to move for suppression of various scraps of paper with writing thereon taken from a trash container in front of home of an indicted coconspirator who fled before trial, where neither of defendants had any proprietary interest in items in question, nor were they persons against whom searches in question were directed.

8. Arrest ⇐63(4)
Criminal Law ⇐394.4(12)
Searches and Seizures ⇐7(12)

Where defendant was arrested pursuant to information that there was a warrant for his arrest for a federal narcotics law violation, and was questioned regarding registration of vehicle, with son stating that car belonged to his father, whereas defendant stated that he had borrowed vehicle from a friend, and a radio check revealed that license plates on vehicle were registered to another vehicle, officers had probable cause to believe that a crime had been committed by all three persons, which provided legal justification for their arrest, and warrantless search of their personal possessions at station house pursuant to arrest was not violative of their Fourth Amendment rights, and ledger book found in wife's purse was not subject to suppression. U.S.C.A.Const. Amend. 4

9. Arrest ⇐63(4)

Notwithstanding claim that arresting officers could not base their arrest of defendant on mere report received by radio that there was an outstanding warrant for his arrest, where, at time of his arrest, there were two valid arrest warrants outstanding, one being issued by district court pursuant to return of an indictment charging defendant with crime of which he was ultimately convicted, and other being issued by a magistrate on an affidavit which adequately set forth facts underlying charging officer's conclusions, facts were sufficient to support an independent judgment that probable cause existed for defendant's arrest.

10. Criminal Law ⇐444

It is function of trial court to determine whether proffered evidence has enough prima facie trustworthiness to warrant its consideration by jury, and generally sufficiency of a showing of authenticity of a writing sought to be introduced into evidence is a matter within discretion of trial court.

11. Criminal Law ⇐444

Notwithstanding claim that mere contents of a writing which is purported to be authored by a particular person are insufficient evidence of genuineness, circumstances extrinsic to document may suffice with sufficient certainty to person or persons who created it to allow jury to consider document.

12. Criminal Law ⇐444

Ledgers and other papers taken from footlocker found in garage of one of defendants where drugs were also found, though technically hearsay, were admissible against that defendant as an admission, though government failed to present any proof that writings were in handwriting of any of defendants, or when writings were made, where particular defendant in effect identified documents as his own by directing agents to "business storeroom" where they were found with his contraband merchandise.

13. Criminal Law ⇐779

Trial court properly instructed jury in drug prosecution that, if they found a conspiracy did exist and that a defendant was a member of conspiracy, statements and acts of those found to be members of conspiracy could be considered by jury as evidence in case as to any defendant found to have been a member, provided such statements or acts were knowingly made or done during continuance of conspiracy and in furtherance of some object or purpose of conspiracy.

14. Criminal Law ⇐428

Where evidence was overwhelming that a dangerous drug conspiracy and a heroin conspiracy did exist, and a majority of testimony, including tape recorded evidence in both cases could easily have supported a finding by jury that defendant in whose garage ledgers and other papers were found was a member of each of conspiracies, and contents of ledgers and other papers appeared on their face to have been written during course of conspiracy and in furtherance of objects of conspiracy, such evidence, coupled with independent evidence of each defendant's participation in conspiracy, was sufficient to allow jury to consider ledgers and other papers taken from defendant's footlocker as to each defendant.

15. Criminal Law ⇐132, 1169(2)

Where scraps of paper taken from defendant's trash did not qualify under either of rationales used to admit ledgers and other papers taken from defendant's footlocker, as there was a great difference between defendant's having identified to arresting officers whereabouts of contraband and records of contraband transactions and merely finding discarded memoranda in defendant's trash, with most of them apparently containing no more than doodles, unrelated telephone call messages and lists of numbers with letters beside them which could easily be taken as reflections of transactions merely contemplated rather than records of transactions actually planned, admission of scraps of paper

recovered from trash was error, but error was harmless in view of other evidence in case.

16. Criminal Law ⇐434, 1169(2)

Where only 12 of 75 pages of ledger book seized from defendant's wife contained writings which trial court deemed sufficiently relevant to admit into evidence in drug prosecution, and even those pages presented a rather sketchy and confusing picture, admission of ledger was error, but error was harmless in view of other evidence in case.

17. Criminal Law ⇐1169(5)

Error, if any, in admitting statement found on recorded tape conversation of alleged conspiracy that "He'll (referring to one of alleged coconspirators) go tonight and kill somebody, or something." was harmless, where, taken in context, it was highly unlikely that jury could have understood statement to mean that particular coconspirator was actually going to commit murder and trial court immediately instructed jury to disregard statement.

18. Conspiracy ⇐43

Where evidence was very persuasive that most of coconspirators not only knew of others, but that all of them knew of and participated in illegal plan of distribution of amphetamines and barbiturates, it was not error for trial court to refuse to give an instruction on possibility of finding multiple conspiracies.

19. Criminal Law ⇐1030(1)

Where there is no plain error, one may not raise on appeal that to which he did not object at trial.

20. Criminal Law ⇐1035(3)

Notwithstanding claim that, during course of trial, some defense attorneys were occasionally excused for short times to attend to other matters, and, each time, the other counsel agreed to represent interests of absent attorney's client, and that such occasional "pinch hitting" deprived defendant of his right to counsel, or at least of his right to effective assistance of counsel, where no objections were made by defendant during course of trial to such procedure and, on the contrary, he specifically consented to it the two times that his counsel was absent, defendant was precluded from raising claim on appeal.

Morris Lavine (argued), Norman J. Kaplan (argued), Barry Tarlow (argued), Eli Blumenfeld (argued), Los Angeles, Cal., for defendants-appellants.

Irving Prager, Asst. U. S. Atty. (argued), George G. Rayborn, David R. Nissen, Asst. U. S. Attys., Robert Meyer, U. S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Before BARNES, ELY and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Appellants Robert Butler and Ted Dean Butler (unrelated) were charged both with conspiracy to possess for sale and to sell dangerous drugs (amphetamine tablets and barbiturate capsules) in violation of 21 U.S.C. § 331(q) and 18 U.S.C. § 371, and with conspiracy to conceal, transport and sell heroin, in violation of 21 U.S.C. § 174 and 18 U.S.C. § 371. Appellants Vincent Arias, Manuel Rodriguez and Charles King were charged only in the conspiracy to possess for sale and to sell dangerous drugs.

The trial court, after defense motions, severed the trial on the dangerous drug count from the trial on the count relating to heroin. The jury returned a guilty verdict as to each defendant at the conclusion of both trials. Appellants together charge sixty-two errors in this appeal.

TRIAL OF THE BUTLERS ON THE HEROIN COUNT

[1] The Butlers allege error of constitutional dimensions based upon the introduction into evidence of various taped telephone conversations that took place between them and John Durden, a

cooperating, unindicted co-conspirator.[1] With Durden's consent, the recordings were made by connecting the telephone he was using with a tape recorder. There is no error. In United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971), the Supreme Court approved the testimony of government agents who related warrantless electronically monitored conversations between the defendant and a consenting informant, and stated that the Fourth Amendment ". . . affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" 401 U.S. at 749, 91 S.Ct. at 1125. See also Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); Lopez v. United States, 373 U.S. 427, 438–439, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963).

[2,3] The Butlers further contend that their rights to counsel and to be free from self-incrimination were violated by the unseen and unheard monitoring of their conversations. They present the interesting argument that, since Durden was calling them at the request of government narcotics agents, they had a right to be warned of their right to counsel before they spoke, citing Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Appellants have failed to appreciate the rationale of the holdings in those cases. Aside from other reasons at the time of the recorded telephone calls, the record does not demonstrate appellants had been indicted and were represented by counsel as in *Massiah*; nor are the facts of this case comparable with *Escobedo* where the investigation had reached the "accusatory" phase, the defendant had been arrested and his request for an attorney denied. In this case, appellants were merely suspected of criminal activity and were being investigated. To grant a right to counsel under such circumstances, including a right to advice of such a right, would be to mutate a constitutional right into a denial of the right of the public to have criminal activity thwarted. There is no right to counsel while one is committing a crime. Grier v. United States, 345 F.2d 523, 524 (9th Cir. 1965).

[4] The Butlers also assert that the trial court committed reversible error by allowing the jury to hear tapes of and simultaneously read transcripts of Durden's half of the recorded conversations, contending that "a great mass of prejudicial hearsay" was thereby allowed into evidence. No particulars of the "great mass" were pointed out by counsel. While it is true that a few of Durden's statements contained narrative statements of events not strictly in furtherance of the conspiracy, none of those statements could reasonably be said to be so prejudicial as to constitute reversible error. The court made a very meticulous effort to excise all such narratives which, in its judgment, could be construed to be irrelevant, and refused to allow the transcripts into evidence, thereby avoiding any potential reinforcement of Durden's half of the conversations. For the Judge to have excised all of Durden's half of the discussions would have rendered the recorded conversations, which were legitimate evidence, unintelligible.

Except as indicated later, we find the remainder of the arguments raised by the Butlers regarding the trial on the heroin count to be devoid of merit.

THE DANGEROUS DRUG TRIAL

I

All of the appellants claim that they were prejudiced by misconduct of the prosecutor. The principal witness for the government was John Durden who had been caught by federal narcotics

1. Appellant King asserts the same error was committed in his trial involving dangerous drugs.

agents and apparently decided to cooperate by assisting the agents in their efforts to secure evidence against his fellow conspirators in hopes of receiving lenient treatment for himself.[2] During the course of the trial, Durden's credibility was frequently and vigorously attacked. One of the principal lines of assault comprised asking Durden whether in fact the pending indictment against him was going to be dismissed in consideration of his testimony against the defendants. To this question, he answered "no."

[5] Appellants argue that, by allowing such testimony to go uncorrected, the prosecutor was acquiescing in the knowing use of false evidence in the manner forbidden by Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and more recently condemned in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). However, such an argument is based upon the premise that a promise of dismissal had definitely been made to Durden and that this alleged promise was known to the prosecution. The government has at all times denied such a promise, and there is no evidence in the record to the contrary.

[6] As a corollary to their "false evidence" argument, appellants contend that the trial court committed reversible error by not allowing them to argue to the jury that Durden's testimony was not worthy of belief since he had been promised a dismissal if he testified against the defendants. The trial judge stated he would allow counsel to argue that Durden had great *expectations* of a dismissal as anyone in a similar position would have. Under the circumstances, it was not unduly restrictive to prevent counsel from arguing that a dismissal was *in fact* forthcoming.

2. The Butlers and Rodriguez assert in their briefs, and the government has not denied, that about two months after the convictions challenged here, the indictment against Durden was dismissed by the government.

II

All of the appellants challenge the admission into evidence against them of certain items seized by the police: a ledger taken from the purse of Mrs. Rodriguez, the wife of co-defendant Manuel Rodriguez, various scraps of paper with writing thereon taken from a trash container in front of the home of Leo Lovato, an indicted co-conspirator who fled before the trial, and two ledgers and some papers seized from a footlocker found in the garage of Leo Lovato. The bases of attack are that the items were secured by illegal searches and seizures and should have been suppressed and that the items lacked any foundation or authentication and were inadmissible.

[7] As to the search of Lovato's trash container and locker, the trial court correctly ruled that the Butlers and Arias lacked standing to move for suppression.[3] Neither the Butlers nor Arias had any proprietary interest in the items in question, nor were they persons against whom the searches in question were directed. Alderman v. United States, 394 U.S. 165, 173-175, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); United States v. Shea, 436 F.2d 740 (9th Cir. 1970); United States v. Toliver, 433 F. 2d 867 (9th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971).

[8] Regarding the ledger book seized from Mrs. Rodriguez, both appellant Rodriguez and his wife submitted affidavits in connection with the pre-trial motion to suppress, swearing that the ledger book belonged to Manuel Rodriguez. Assuming, without deciding, that Rodriguez did have standing to move to suppress, examination of the circumstances surrounding the seizure reveals that the police did not overstep the

3. Rodriguez also moved to suppress the material taken from Lovato's footlocker. Apparently the trial judge never ruled on Rodriguez's motion.

bounds set by the Fourth Amendment. Rodriguez was arrested pursuant to information that there was a warrant for his arrest for federal narcotics laws violations. At that time Rodriguez was sitting in a car in a parking lot along with his wife and son; the latter was in the driver's seat. After the arrest of Rodriguez, he and his son were questioned regarding the registration of the vehicle. The son said the car belonged to his father, whereas Rodriguez stated that he had borrowed the vehicle from a friend. A radio check revealed that the license plates on the vehicle were registered to another vehicle. Mrs. Rodriguez and the son were questioned further regarding the vehicle's registration and, upon their failure to give a satisfactory explanation, were placed under arrest for suspicion of grand theft auto. Pursuant to that arrest, Mrs. Rodriguez was subsequently "booked," at which time the contents of her purse were inventoried and the ledger in question was recovered. Even though subsequent investigation revealed that the car was not in fact stolen, it is clear that the officers had probable cause to believe that a crime had been committed by all three of the Rodriguezes, which, of course, provided legal justification for their arrest. Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). A warrantless search of personal possessions at the station house pursuant to a valid arrest does not violate one's Fourth Amendment rights. See, for example, Charles v. United States, 278 F.2d 386, 388 (9th Cir. 1960).

Counsel for Rodriguez cites Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), arguing that the arresting officers could not base their arrest of Rodriguez upon the mere report received via radio that there was an outstanding warrant for Rodriguez's arrest. In *Whiteley*, a sheriff had secured an arrest warrant based on his own conclusory statement that Whiteley had broken and entered a building, and then radioed a bulletin containing a description of the suspect, of the car he was driving, and of the amount and type of money he was suspected of taking. Acting on the bulletin, an officer arrested Whiteley, searched his car and recovered damaging evidence against him. The Supreme Court held that the warrantless arrest based upon the radio bulletin could not supply the element of probable cause that the sheriff issuing the bulletin lacked, and so ruled that the seized evidence should have been suppressed.

[9] Here, at the time of Rodriguez's arrest, there were two valid arrest warrants outstanding. One was issued by the district court pursuant to the return of an indictment charging Rodriguez with the crime of which he was ultimately convicted, and the other issued by a magistrate upon an affidavit which adequately set forth the facts underlying the charging officer's conclusions, and so were sufficient to support an independent judgment that probable cause existed for Rodriguez's arrest. See Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

III

Aside from the question of the search, it is argued that all of the items seized lacked any foundation or authentication and so were inadmissible against the appellants. The government failed to present any proof that the writings were in the handwriting of any of the appellants, or of when the writings were made.

[10, 11] It is the function of the trial court to determine whether proffered evidence has enough prima facie trustworthiness to warrant its consideration by the jury, and generally the sufficiency of a showing of authenticity of a writing sought to be introduced into evidence is a matter within the discretion of the trial judge. Arena v. United States, 226 F.2d 227, 235 (9th Cir. 1955). Appellants insist that the mere contents of a writing which is purported to be authored by a particular person

are insufficient evidence of genuineness. See 7 J. Wigmore, Evidence § 2148 (3d ed. 1940). However, circumstances extrinsic to the document may point with sufficient certainty to the person or persons who created it to allow the jury to consider the document. See, for example, United States v. Sutton, 138 U.S. App.D.C. 208, 426 F.2d 1202, 1207 nn. 34-36 (1969) and cases cited therein.

When Leo Lovato was placed under arrest at his residence, and in response to inquiry about dangerous drugs, he pointed out to the officers the location in his attached garage where the drugs could be found. The drugs were in boxes and a footlocker, the latter also containing two ledgers and various papers. The contents of the ledgers lead one to the obvious conclusion that they were records of a drug business. One of the ledgers seized from Lovato's locker appears to contain a running account of distribution to the co-conspirators; under each of their names, each entry is dated, units of "R" and "W" or in some cases "Reds" and "Whites" are recorded, and dollar amounts are noted next to the entries. The other ledger contains similar notations, but with the additional entries of, e. g., "C#1," "C#2," etc., "Pd $20 tip C#8," "Pd $250 to driver" and "Pd in full." Similar notations were contained on the slips of paper found in Lovato's footlocker. Also, some of the entries corresponded exactly with transactions about which there was independent evidence in the form of tape-recorded conversations and testimony of John Durden. Considering the reality that proof of conspiracies must often rely heavily upon circumstantial evidence [See Diaz-Rosendo v. United States, 357 F.2d 121 (9th Cir.), cert. denied, 385 U.S. 856, 87 S.Ct. 104, 17 L.Ed.2d 83 (1966), and Davenport v. United States, 260 F.2d 591, 598 (9th Cir. 1958)], and given the circumstances of this case, we find ourselves in agreement with Professor McCormick:

> Should not the practice of accepting as prima facie genuine a document which comes from a natural custody be extended beyond the field of public duty, and be recognized for writings found in private custody? It seems that it should, but that here the practice should be discretionary and that if the judge finds that the purport of the writing and the fact that it was found in a place and custody natural for such a paper, and the other attending circumstances, make its genuineness substantially probable, it should come in.[4]

The same conclusion was reached in People v. Ramsey, 83 Cal.App.2d 707, 189 P.2d 802 (1948) in dealing with a similar situation. At defendant's home, where an alleged abortion occurred, a looseleaf notebook was found in a cupboard beside a telephone where an appointment book would usually be kept. The notebook contained entries showing a date, time, name, address and telephone number which were consistent with the alleged abortion. The court ruled that the notebook was admissible, despite the fact that neither authorship nor when the entry was made was shown.

[12] Since the ledgers and other papers taken from Lovato's footlocker are technically hearsay, an alternate theory of admissibility is that they constituted an admission by Lovato. Here, Lovato in effect identified the documents as his own by directing the agents to his "business storeroom" where they were found with his contraband merchandise. The circumstances here provide a much more reliable index of genuineness than, for example, an unsigned letter found on a defendant's premises with no independent evidence to demonstrate a mean-

4. C. McCormick, Evidence § 191, p. 403 (1954). *See* also 7. J. Wigmore, Evidence § 2160 n. 4 (3d ed. 1940), and cases cited. Wigmore is cited as sole authority in United States v. Imperial Chemical Industries, Ltd., 100 F.Supp. 504, 513 (S.D.N.Y.1951).

ful connection. See Poy Coon Tom v. United States, 7 F.2d 109 (9th Cir. 1925).

[13,14] Admissibility as to Lovato does not end the inquiry—the question of admissibility as to appellants remains. However, the trial judge properly instructed the jury that, if they found a conspiracy did exist and that a defendant was a member of the conspiracy, then the statements and acts of those found to be members of the conspiracy (as Lovato) may be considered by the jury as evidence in the case as to any defendant found to have been a member, provided such statements or acts were knowingly made or done during the continuance of the conspiracy, and in furtherance of some object or purpose of the conspiracy. In this case, the evidence was overwhelming that a dangerous drug conspiracy and a heroin conspiracy did exist, and the majority of the testimony, including the tape-recorded evidence in both the dangerous drug case and the heroin case could easily have supported a finding by the jury that Leo Lovato was a member of each of the conspiracies. The contents of the ledgers and other papers appear on their face to have been written during the course of the conspiracy and in furtherance of the objects of the conspiracy. Such evidence, coupled with the independent evidence of each of the defendants' participation in the conspiracy[5]

[5] Taken in the light most favorable to the government (Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942)) the other evidence with respect to the dangerous drug conspiracy was as follows:

Amphetamines and barbiturates in the form of pills were packaged in plastic bags, which were concealed in the panelling of cars, and the "load" cars were driven across the border to various places, apparently at the direction of Joseph Damian Lovato (hereinafter "Joe Lovato"). Also at the direction of Joe Lovato, generally defendant Hilaria Aguirre, known as "Rosa," would call Durden and tell him where to pick up an incoming load car.

Durden would then pick up the load car, dismantle it to retrieve the contraband, hide the contraband, and return the load car to the same place it was picked up. Then Durden would generally check back with Rosa, who informed him to whom he was to distribute the drugs, apparently on a consignment basis.

According to Durden's testimony, he first met Manuel Rodriguez in the company of Joe Lovato. Joe Lovato asked Durden to hold some drugs for him while he (Joe) made a trip into Mexico, to which Durden agreed. Manuel Rodriguez then took thirty bags of "reds," each containing five thousand pills, from his own car and placed them in the trunk of Durden's car.

Durden also testifed that he distributed a couple of pills to Manuel Rodriguez on a number of occasions. Durden also testified that Rodriguez had supplied Durden with pills.

According to the testimony of narcotics Agents Sternaman and Tarallo, while surveilling the residence of Joe Lovato, Rodriguez was seen in the company of Vincent Arias, exiting Lovato's residence, Rodriguez and Arias drove away together, went into a restaurant and returned in a while to Lovato's residence. While the two were at the restaurant, a dark brown ledger was observed by Agent Tarallo on the seat of the vehicle the two were in.

A fellow employee of Rodriguez testified that Rodriguez got up abruptly from an interview at his company's personnel office upon sighting a police car through the window and trotted away. The officer who arrested Rodriguez confirmed the testimony regarding his attempted flight.

A fingerprint expert testified that Rodrequez's fingerprints appeared on four separate pages of a ledger book recovered from the purse of his wife, who was also arrested with Rodriquez. Agent Tarallo testified that the same ledger book was the one he had earlier seen on the seat of the vehicle which Arias and Rodriguez had taken to the restaurant from Joe Lovato's residence.

The ledger book taken at Rodriguez's arrest contained lists of "R" and "W" ("Whites" is a term which also is used in that exhibit) under peoples' names, dated within the period of the conspiracy. These dates substantially coincided with the dates of deliveries to Leo Lovato as evidenced by the latter's ledgers.

Agent Sternaman testified that on April 1, 1970, he and Agent Clemente arrived as Manuel Rodriguez was being booked into jail. He examined the ledger book which had been taken from Mrs. Rodri-

Note 5—Continued

guez, told the jailers of his interest in it as evidence and of his intention to take it later. Sternaman thereupon advised Rodriguez of his rights and ascertained that Rodriguez understood these rights. Sternaman, while leafing through the book, asked Rodriguez what the "W" and "R" stood for. Rodriguez responded by smiling and shrugging. When asked if the letters stood for drugs, Rodriguez shrugged and smiled faintly again. (The court instructed that the jailhouse interview testimony was to be taken only as to Rodriguez.)

Durden testified that Arias received five separate loads of amphetamines and barbiturates, totalling nearly a million pills from Durden from the middle of August through the first week of September, 1969. Durden also testified that Arias called him several times during the period of the conspiracy and inquired as to whether Durden had anything on hand.

Durden testified that Charles King came to Durden in June, 1969, and received twenty thousand or twenty-five thousand reds. Two more loads of five thousand or ten thousand pills were distributed by Durden to King in August, 1969.

In a taped telephone conversation between Durden and Robert Butler, in response to inquiry by Durden as to whether Lovato would have "something" for Durden, Butler replied, "He's all empty . . . he only got those 30, 30, 35 I think. The ones he got from those other people. And he hasn't got anything in since then. He bought these from another source and these people charged him 5 over what he normally was going." Robert Butler also stated to Durden, "I told him I'm going over there with him next time . . . trip coming up here you know."

In another conversation with Durden, Robert Butler asked Durden whether he could get some older model cars for Joe Lovato and Robert Butler.

Durden testified that he had seen Robert Butler at one time accompanying Joe Lovato, and that there was conversation between Butler and Lovato about load cars. In response to a statement by Lovato that another load car would be in that night, Butler replied that he wanted either one hundred thousand or two hundred thousand "reds" and thereafter engaged in a conversation with Lovato about such a drug transaction. Lovato then made a telephone call, asking the other party whether there were "20 big ones or 20 pillows" available. Shortly thereafter, Leo Lovato arrived and immediately left with Robert Butler. Soon thereafter, Leo and Robert Butler returned, whereupon Butler made a telephone call and asked for money and said, "I have got the stuff."

Ted Butler was accompanying Durden when he was arrested by undercover Agent Sternaman for attempting to sell Sternaman fifty thousand reds and fifty thousand whites.

In their jail cell, Durden explained Lovato's dangerous drug operation to Ted Butler. Butler expressed to Durden that he had not previously been aware of what had actually occurred but that as long as he was involved now, he would like to get fully involved in the operation. Durden had not proposed that Ted Butler get involved; Butler volunteered.

The day after Durden and Ted Butler were released from jail, they went to a telephone booth and, with Ted Butler waiting in the car, Durden called Joe Lovato. When Lovato told him there was another car in, Durden told him he would call back. Durden then told Ted Butler about the car and suggested that they find some place new to store the load; Butler agreed. The two men drove to another person's house to find if they could keep the drugs there, but the individual was not there. Since they were leery that agents might be following them, Durden decided that it would be best not to store this load.

The weekend after Durden was released from jail, he met with Joe Lovato and Vincent Arias and told them that Ted Butler had been arrested with Durden. Ted Butler soon became involved with Lovato in acquiring dangerous drugs. Ted Butler once presented Durden with $580 to pay to Joe Lovato as one payment for Butler's prior acquisition of twenty thousand barbiturates. The total payment was $1,100; Butler had previously paid Lovato $520.

On November 19, 1969, Durden called Joe Lovato. Lovato told Durden that there were three barrels of reds and one of whites across the border which he wanted somebody to go down and pick up. Lovato wanted Durden to get a car in which to "hide them". Durden called Ted Butler, who stated that he would pick up the load with Durden.

The independent evidence of participation in a conspiracy to conceal, transport and sell heroin by the Butlers is similarly persuasive. Durden testified that when he first met Robert Butler through Joe Lovato (who was indicted but failed to appear for trial) on October 30, 1969, heroin trade was discussed. The same subject was discussed by Robert Butler and Durden alone again the next day, and

likely that the jury could have understood the statement to mean that Rodriguez was actually going to commit murder. The full statement was, "The other thing is that Manuel, they don't play with Manuel and Manuel might get in some trouble you know, that way. He'll go tonight and kill somebody or something." It seems apparent that Joe Lorato was merely trying to communicate that Manuel (Rodriguez) was a bit too impulsive to stay out of trouble as far as some were concerned, so that he was not to be trusted fully. The second reason is that the trial judge immediately instructed the jury to disregard the statement about killing. In our view, the combination of these two factors made the error, if there was any, harmless.

V

All of the appellants argue that the evidence taken in the light most favorable to the government showed the existence of multiple conspiracies rather than a single conspiracy and that, therefore, the judge committed reversible error by refusing to instruct the jury on the possibility of finding multiple conspiracies. Principal reliance is placed upon Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), where the Supreme Court found that only one of the defendants had participated in a number of separate and distinct conspiracies with a number of different individuals, and so there was no conspiratorial nexus tying all of the defendants together in a conspiracy common to all. The rationale of the decision was that it was highly prejudicial to the defendants to allow all the evidence of the separate crimes to be introduced against all of the defendants to prove a single crime.

[18] We think that this case is controlled by the law set forth in Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947). In that case, three salesmen separately agreed to distribute illegal whiskey for two other defendants, who had an agreement between themselves; no salesman knew or had any dealings with any other salesman and each was geographically far from the others. The Court distinguished the *Kotteakos* case and found that only one conspiracy existed:

> By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal. 332 U.S. at 558, 68 S.Ct. at 257.

Here, the evidence was very persuasive that most of the coconspirators not only knew of the others, but that all knew of and participated in the illegal plan of distribution of the amphetamines and barbiturates. Under such circumstances, we hold that it was not error for the trial court to refuse to give an instruction on the possibility of finding multiple conspiracies.

VI

[19, 20] During the course of the trial, some of the attorneys for the defense were occasionally excused for short times to attend to other matters. Each time, other counsel agreed to represent the interests of the absent attorney's client. Appellant King contends that such occasional "pinch hitting" deprived him of his right to counsel, or at least of his right to effective assistance of counsel. However, no objections were made by King during the course of the trial to this procedure; on the contrary, he specifically consented to it the two times that his counsel was absent. Although such a practice may be questioned, it is well settled that where, as here, there was no plain error, one may not raise on appeal that to which he did not object at trial. United States v. Markham, 440 F.2d 1119 (9th Cir. 1971); White v. United States, 315 F.2d 113 (9th Cir.), cert. denied, 375 U.S. 821, 84 S.Ct. 58, 11 L.Ed.2d 55 (1963);

Grant v. United States, 291 F.2d 746 (9th Cir. 1961).

We find the remainder of appellants' argument to be without merit.

Affirmed.

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Attorneys for Petitioner
ROBERT BUTLER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

ROBERT BUTLER, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	No. _____ (9th Cir. no. 71-1029) AFFIDAVIT OF BARRY TARLOW

State of California)
)ss
County of Los Angeles)

Barry Tarlow, being duly sworn, says and deposes as follows:

1. I, a member of the bar of this Court and of California state and federal courts, represent Robert Butler for purposes of petitioning for certiorari. At the trial and appellate levels, United States v. King, 472 F.2d 1 (9th Cir. 1973), I served as counsel for Manuel Rodriguez, a codefendant of Robert Butler on one conspiracy charge.

2. On appeal from the Rodriguez judgment I stressed that the government's use of false evidence before the jury and the court necessitated reversal of the judgment (Appellant's opening brief, 9th Cir. no. 71-1088, pages 17-22, 44-51). The government responded with a motion to strike the brief, but without any sworn statement refuting the charges. In response to the government's motion, I filed a sixteen page memorandum

(Response in Opposition to Motion to Strike Appellant's Brief, 9th Cir. no. 71-1088). The "offer of proof" of government violations which had been in the brief was now a matter of affidavits from attorneys Ronald Bain, Norman Kaplan, Wesley Russell and myself (copies are appended).

3. At no time has the government countered the false evidence and misrepresentation charges under oath. When the court of appeals states "[t]he government has at all times denied such a promise [to dismiss charges against an informer]," United States v. King, supra, 472 F.2d at 6, the opinion more precisely might notice that the government has at no time admitted the charges under oath.

4. Indeed, however, the government in effect has admitted its use of false evidence and misrepresentations to the trial court. During oral argument of the cause before Circuit Judges Barnes, Ely and Wallace, Judge Ely and Wallace questioned government counsel concerning the charges. With particular reference to the charge that government counsel lied to the trial court concerning his intentions to dismiss the indictment against the key witness informer, government counsel stated to the court of appeals, to the best of my recollection, that his intentions were to reduce the charges against the informer to a misdemeanor count.

5. I formerly served as an assistant United States attorney for the Southern District of California (now the Central District). It is my experience that felony charges, such as were here involved against the key witness informer, cannot be reduced to a misdemeanor accusation unless the government at some time dismisses the felony indictment and files an information charging a misdemeanor. Thus, in order for government counsel to effectuate even his intentions as admitted to the court of appeals to reduce the informer's charges to that of a possible misdemeanor, he must dismiss the felony case. Yet, during the first trial of

petitioner Robert Butler, government counsel succeeded in precluding the defense from arguing the informer would not be prosecuted by deluding the federal trial judge: "May I state for the record I do not intend to dismiss the case against John Durden [the informer]." [I R.T. 1938].

6. On August 17, 1970, the sentences in this case were imposed by the district court [I R. 355, 359, 440]. According to the court files in United States v. John Durden, C.D. Cal. nos. 4762, 4847, on September 29, 1970, the district court granted the government's motion to dismiss all charges against informer Durden. See United States v. King, supra, 472 F.2d at 6 n.2.

Sworn and subscribed
before me this 4th
day of April, 1973.

Barry Tarlow

Notary Public

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Attorneys for Defendant-Appellant
MANUEL RODRIGUEZ

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL RODRIGUEZ, Defendant -Appellant	No. 71-1088 AFFIDAVIT OF RONALD BAIN

In the State of California)
) ss
County of Los Angeles)

Ronald Bain, being duly sworn, says and deposes as follows:

I have been admitted to the practice of law in California for approximately ten years. For approximately five years I was an Assistant District Attorney for the County of Los Angeles. For the last three years, I have been a member of the Federal Indigent Defense Panel.

After attorney Barry Tarlow had filed his opening brief in this matter, I had a conversation with him and for

the first time brought the matters which are contained in this affidavit to his attention. At the trial in the above-entitled case, I represented defendant Hilaria Aguilar. She has been granted probation and an appeal is not pending from her conviction. Prior to the trial in the above-entitled case there were certain negotiations between Mr. Prager and myself on the subject of Hilaria Aguilar's potential cooperation with the government. On one occasion prior to the trial I came to Mr. Prager's office and the informant John Durden was present. John Durden left the office and I questioned Assistant United States Attorney Prager as to what consideration John Durden would receive in exchange for his cooperation with the government in this case. Assistant United States Attorney Prager gave me the following answer, "I probably will dismiss his case, but I haven't told him about it yet."

Subscribed and Sworn to Before me
this 10th day of May, 1971

Ronald Bain

Notary Public In and For Said County
and State

OFFICIAL SEAL
JAN F. DWYER
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires July 27, 1973

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MANUEL RODRIGUEZ

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL RODRIGUEZ, Defendant-Appellant.	No. 71-1088 AFFIDAVIT OF NORMAN KAPLAN

In the State of California)
) ss
County of Los Angeles)

Norman Kaplan, being duly sworn, says and deposes as follows:

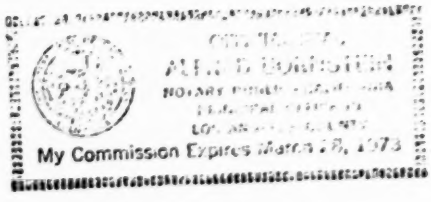
I am an attorney and have practiced law in the State of California for approximately ten years. I have been admitted to practice in the United States District Court at Los Angeles, California for approximately the same amount of time. I was the trail attorney for Vincent Arias, who is a codefendant of Manuel Rodriguez in the above-entitled case, and I presently represent Mr. Arias on appeal. On several occasions attorney

Wesley Russell has informed me, that prior to the trial in the above-entitled case Assistant United States Attorney Prager on more than one occasion told Attorney Russell that all charges against John Durden would be dropped in exchange for John Durden's cooperation in the cases which are the subject of this appeal. Wesley Russell also informed me that these statements were made during the course of pretrial negotiations for the cooperation of defendant Charles King. Attorney Barry Tarlow was present on more than one occasion when Wesley Russell made the above statements.

Norman J. Kaplan
NORMAN J. KAPLAN

Subscribed and Sworn to Before me
this 13th day of May, 1971

Notary Public In and For Said County
and State



LAW OFFICES OF BARRY TARLOW
Attorney at Law
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Attorneys for Defendant-Appellant
MANUEL RODRIGUEZ

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL RODRIGUEZ, Defendant-Appellant	No. 71-1088 AFFIDAVIT OF WESLEY RUSSELL

In the State of California,)
) ss
County of Los Angeles)

Wesley Russell, being duly sworn, says and deposes as follows:

I am an attorney at law and have been admitted to practice in the state of California and before the United States District Court for the Central District of California. I was formerly an Assistant District Attorney in the County of Los Angeles.

At the trial in the above-entitled case I represented Charles King. Although his case is on appeal, I no longer

represent him. Prior to the trial in the above-entitled case, I had several conversations with Assistant United States Attorney Irving Prager, during which we discussed the question of whether or not Charles King would testify as a government witness in the pending trial. On more than one occasion prior to the trial in the above-entitled case, Assistant United States Attorney Prager informed me that in exchange for John Durden's cooperation and testimony in the above-entitled case that he (Irving Prager) intended to dismiss all of the pending Federal charges involving John Durden.

Subscribed and Sworn to Before me
this 11th day of May, 1971

Wesley Russell

Notary Public in and For Said County
and State

OFFICIAL SEAL
NORMAN J. KAPLAN
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Dec. 20, 1971

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL RODRIGUEZ, Defendant-Appellant	No. 71-1088 AFFIDAVIT OF BARRY TARLOW

In the State of California)
) ss
County of Los Angeles)

Barry Tarlow, being duly sworn, says and deposes as follows:

Wesley Russell, attorney at law, has stated to me in the presence of attorney Norman Kaplan that on more than one occasion prior to the trial in United States of America v. Manuel Rodriguez, Assistant United States Attorney Irving Prager told him that all charges against John Durden would be dismissed in exchange for Durden's cooperation with the government in this case. Wesley Russell has also informed me

that these statements were made by Assistant United States Attorney Prager during the course of pretrial negotiations for the cooperation of codefendant Charles King, the client of attorney Wesley Russell.

Subscribed and Sworn to Before me
this 10th day of May, 1971

Barry Tarlow
Barry Tarlow

Notary Public in and for Said County
and State

OFFICIAL SEAL
JAN F. DWYER
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires July 27, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1213

TED DEAN BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1356

ROBERT BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Ted Dean Butler Pet. App. A) is reported at 472 F. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1972. A petition for rehearing was denied on February 7, 1973. On March 6, 1973, Ted Dean Butler's petition was filed.[1] Mr. Justice Douglas extended Robert Butler's time for filing a petition for a writ of certiorari to April 7, 1973, and the petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government suppressed evidence that it had promised that charges against the government's principal witness would be dropped.

2. Whether petitioners' trials before separate juries on each charge against them, pursuant to their own motion for severance, constituted double jeopardy.

3. Whether the evidence showed multiple conspiracies rather than two conspiracies, and whether the evidence was sufficient.

4. Whether 21 U.S.C. (1964 ed., Supp. V) 331(q) is unconstitutionally vague because it requires reference to 21 U.S.C. (1964 ed., Supp. V) 360a to determine which drugs are involved.

5. Whether entrapment was established as a matter of law.

6. Whether there were illegal searches or seizures.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners were

---

[1] Petitions for writs of certiorari have also been filed in this case by co-defendants Vincent Arias, No. 72-6538, and Manuel Rodriguez, No. 72-6535. We are responding separately to these petitions.

convicted of conspiring to possess dangerous drugs for sale and to sell dangerous drugs, in violation of 18 U.S.C. 371 and 21 U.S.C. (1964 ed., Supp. V) 331(q) (Count I). After a second jury trial, which had been severed from the first trial pursuant to petitioners' motion, they were convicted of conspiracy to conceal, transport, and sell heroin in violation of 21 U.S.C. (1964 ed.) 174 (Count V). Ted Dean Butler was sentenced to concurrent terms of two years' imprisonment on Count I and five years' imprisonment on Count V. Robert Butler was sentenced to concurrent terms of two years' imprisonment on Count I and seven years' imprisonment on Count V. The court of appeals affirmed (Ted Dean Butler Pet. App. A).

1. *The Government's Witness, John Durden.*

The government's primary witness at trial was co-conspirator John Durden. He testified that when some friends wanted drugs in June 1969, he obtained them from Joe Lovato,[2] whom he knew as a drug dealer (R.T. 576-578).[3] After this sale, Joe Lovato offered Durden a position selling drugs (R.T. 578, 581), which Durden accepted (R.T. 581-591). On September 9, 1969, Durden was arrested as he attempted to make a sale of amphetamines and barbiturates (R.T. 661-662). Petitioner Ted Dean Butler, who happened to be accompanying Durden, was also arrested (R.T. 662-667).

After the arrest and while in jail, Durden revealed to Ted Dean Butler that he was involved in a drug operation headed by Lovato (R.T. 668-669). Butler stated

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[2] Co-defendant Lovato fled from custody and now resides in Mexico. His cousin, co-defendant Leo Lovato, has also absconded to Mexico.

[3] "R.T." refers to the reporter's transcript of the trial; "Jury Tr." refers to a transcript of taped telephone conversations submitted to the jury.

he had not been aware of what was occurring, but now "might as well just go ahead and try and do my thing," and work with Durden in the drug operation (R.T. 671-672). At the time Durden had not begun cooperating with the government and, in any event, did not propose that petitioner become involved; petitioner volunteered (R.T. 668-673). According to Durden, petitioner thereafter became a part of the illicit drug operation by transporting and selling dangerous drugs for Lovato and distributing them to various customers (R.T. 978-980, 983-985, 674-675, 735-736, 750-751, 773-775).

After Durden's arrest, narcotics agents were first unsuccessful in their attempt to get him to cooperate with them (R.T. 681-682). Finally, in the middle of October 1969, after he had been indicted, Durden agreed to cooperate fully with the agents (R.T. 685). Thereafter, the agents had Durden make telephone calls to participants in the drug and narcotics conspiracies and record these calls on tape (R.T. 708-709).

2. *The Dangerous Drugs Charge (Count I).*

In a recorded conversation on October 27, 1969, Joe Lovato told Durden that "Ted and Bob [*i.e.*, petitioners] have been dealing all along" and "Bob has been getting in plenty * * *. They got about seven * * * that was the day before yesterday * * * they got ten" (Jury Tr. 215-216). In another taped conversation on October 31, 1969, Durden called Robert Butler and inquired whether Lovato would have "something" for him. Robert Butler discussed the quantity of drugs which Joe Lovato had and commented that he would go with Lovato on his next trip to replenish his supply (Jury Tr. 227-299). Durden also testified about his and Robert Butler's meeting with Joe Lovato in November, 1969. Robert Butler at that time placed an order for

"reds".[4] During the meeting Robert Butler went away with Leo Lovato, Joe Lovato's cousin, and returned stating that he had received his order (R.T. 747-749, 768-773). There was also a late 1969 meeting of the conspirators, including Robert Butler, wherein the shortage of drugs was discussed (R.T. 773-775). On December 12, 1969, Durden engaged in another recorded conversation with Robert Butler in which Robert Butler told him that a car had arrived and complained that although Leo Lovato probably got the load "he didn't even pass it on to anybody at all" (Jury Tr. 374).

In a November 19, 1969 conversation Joe Lovato told Durden to pick up four barrels of pills in San Diego and hide them. Durden then called Ted Dean Butler, who stated he would help him pick up the drugs (R.T. 735-736, 978-980).

When Leo Lovato was arrested in February 1970 and asked about dangerous drugs, he pointed out to the arresting agent where the drugs could be found. Included with them in a footlocker were two ledger books he used in the conspiracy. In one of these ledgers (G. Ex. 21, 1st Trial), "Bob" had a separate page used solely for his transactions. Listed therein were two drug entries, one of "5 R", the other of "20 R". Petitioner Robert Butler's telephone number was listed in the same ledger book (G. Ex. 21, 1st Trial). Other pages in the book showed "Ted" had also been dealing in "Reds" and "Whites". The other ledger (G. Ex. 15, 1st Trial) taken from Leo Lovato, indicated a list of 27 cars arriving on various dates and containing various amounts of "R's" and "W's" (Reds and Whites). In this ledger a page was devoted to "Bob" indicating he had received "5 R" from "C

[4] "Reds" is the common term for barbiturates and "Whites" is the common term for amphetamines.

no. 15" on 12/5. A search of Leo Lovato's trash by government narcotics agents revealed amphetamine residues and a scrap of paper with Robert Butler's telephone number on it.

3. *The Narcotics Charge (Count V).*

Durden first became involved with heroin when, in October 1969, Joe Lovato told him he could supply him with that substance (R.T. 42). Durden testified that on October 30, when he first met Robert Butler through Joe Lovato at Robert Butler's dress shop, heroin trade was discussed (R.T. 47-49). The next day Durden talked with Robert Butler again, and Butler said he would have to "go back to Ohio" to get a sample of heroin due to the poor quality supplied by Joe Lovato (R.T. 51). Durden testified that he was present when Robert Butler and Joe Lovato met to discuss a heroin purchase on about November 3. Robert Butler gave Joe Lovato an unknown amount of money, and told Lovato that he would know the next day—after testing a "sample"—if he wanted to buy five or six "pieces" (ounces) of heroin Lovato had ready in Mexicali, Mexico (R.T. 52-53).[5]

On the telephone with Durden, Joe Lovato extensively discussed Robert Butler's role in the heroin conspiracy. At a January 13, 1970 meeting, where Durden and narcotics agent Gordon took delivery of some heroin from Leo Lovato, Lovato in the presence of Agent Gordon, discussed "Bob's" complaints about heroin quality (R.T. 260, 263-265). Durden testified that on or about the 8th of December, he spoke with Robert Butler, who had recently returned from a trip to several cities "back East" to assess the trade in heroin there (R.T. 90-91). Later, in a December 9th meeting with

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[5] Durden also testified that it was one of his and Robert Butler's functions to acquire the cars to enable Lovato to secretly smuggle heroin from Mexico (R.T. 171-172).

Joe Lovato and Robert Butler, Lovato confronted Robert Butler, saying, "[w]hat are you trying to do, start a business back East with my money" (R.T. 92-93).

Ledger books seized from Leo Lovato (G. Exs. 4, 5, 2nd Trial) showed "Bob" receiving many "Pcs" ("pieces", or ounces of heroin). A notebook contained a telephone number traced to Robert Butler (R.T. 551-552, 561).

Ted Dean Butler also became involved in the sale of narcotics. In a December 1969 recorded conversation he told Durden about receiving heroin from Joe Lovato (R.T. 535). Leo Lovato's ledger also showed that Ted Dean Butler had received heroin from the Lovatos during the period of the conspiracy.

ARGUMENT

1. Petitioners assert that they were prejudiced during their trial because the prosecutor suppressed the alleged fact that the government had promised Durden that the indictment against him would be dropped and falsely stated to the trial court that he did not intend to dismiss the indictment against Durden, the principal witness against petitioners (Tr. 1938). Petitioner Robert Butler attempts to support these contentions with an affidavit of his counsel reciting counsel's belief that the prosecutor intended to drop the indictment, and with other affidavits from the counsel of co-defendants Rodriguez and King reciting that prior to trial during plea bargaining the prosecutor had indicated that the charges against Durden probably would be dropped.[6] These affidavits were first submitted on appeal. At that time the government offered to submit counter-affidavits to the court of appeals, but this offer was rejected by the court as unnecessary. But even assuming *arguendo*

[6] About two months after the last trial the charges against Durden were in fact dropped.

the correctness of these affidavits, they provide no support for petitioners' contention that there was reversible error.

Durden testified that he had not been promised a dismissal in consideration for his testimony (Tr. 796), but he did admit that he hoped for leniency in exchange for his cooperation with the government (Tr. 951, 953-954). The court accordingly allowed the defendants to argue to the jury that Durden had "great expectations" of dismissal, as anyone in a similar position would have. Thus the defense was allowed to attack Durden's credibility by arguing that Durden was testifying in expectation of dismissal.

The affidavits offered by petitioner Robert Butler do not even purport to establish that the prosecutor made any "promise" to or "deal" with Durden. They show different expressions by the prosecutor of his personal intentions—not communicated to Durden —to dismiss or not to dismiss the indictment against him. Thus the prosecutor told the court, "May I state for the record I do not intend to dismiss the case against John Durden" (R.T. 1938); whereas he told the attorney for co-defendant Rodriguez, Ronald Bain, that "I probably will dismiss [Durden's] case, but I haven't told him about it yet." (Robert Butler Pet. App. B.) Whatever the prosecutor's actual intentions with regard to Durden, there is no suggestion that any promise was made to him but withheld from the court and co-defendants at trial. Therefore, this case is not like *Giglio* v. *United States,* 405 U.S. 150, or *Napue* v. *Illinois,* 360 U.S. 264, upon which petitioners rely. In each of those cases the government's principal witnesses were allowed falsely to testify that they had not been promised leniency by the prosecution and the defense was consequently precluded from using this suppressed information in attacking the witnesses'

credibility. Here, as the court of appeals noted (Ted Dean Butler Pet. App. A, p. 5), there is no evidence that any such promise was made, and in any event, the defense was allowed to attack the witness's credibility by arguing that Durden had great expectations of dismissal.

2. Petitioners argue that they were placed in double jeopardy because they were tried before two juries and received two sentences on one indictment. Since, however, these separate trials were granted upon petitioners' motion for severance, they have no cause for complaint. Cf. *Smith* v. *United States,* No. 72-6083, certiorari denied, April 23, 1973 (dissent of Justice Douglas). Moreover, separate trials on one indictment do not amount to double jeopardy unless the issues to be litigated are the same. *Ashe* v. *Swenson,* 397 U.S. 436. There is no suggestion of a duplication of issues here.

3. Petitioners further contend that evidence at each trial showed multiple conspiracies rather than a single conspiracy to distribute illegal drugs and that the court should have delivered instructions on multiple conspiracies. But as the court of appeals noted (Ted Dean Butler Pet. App. A, p. 16), the evidence was "very persuasive that most of the co-conspirators not only knew of the others, but that all knew of and participated in the illegal plan of distribution of the amphetamines and barbiturates." There was thus evidence at each trial of a single conspiracy and the trial judge correctly concluded that no special instruction on multiple conspiracies was required. See *Blumenthal* v. *United States,* 332 U.S. 539. The related claim that the evidence was insufficient to show that petitioners participated in the conspiracies charged in Counts I and V is refuted by our recital of the facts in the Statement, *supra,* which shows that petitioners' participation was substantial.

4. Petitioners assert that 21 U.S.C. (1964 ed., Supp. V) 331(q), under which they were convicted (Count I),

is unconstitutionally vague. The argument is that vagueness resulted because the prohibition against the sale of certain drugs in 21 U.S.C. (1964 ed., Supp. V) 331(q)(2) and (3) (subsequently deleted by Pub. L. 91-513) required reference to 21 U.S.C. (1964 ed., Supp. V) 360a(b) and (c)(1) to determine which drugs were considered illicit, requiring a citizen to search the United States Code to determine whether the drug sales he intended to make were prohibited. However, the doctrine of incorporation by reference is hardly unusual and clearly does not amount to constitutional vagueness.[7]

5. Petitioner Ted Dean Butler contends that Durden's participation in the conspiracy amounted to entrapment as a matter of law. But petitioner voluntarily joined the conspiracy *before* Durden became a government agent. Therefore, petitioner failed to establish any creative activity by the government amounting to entrapment. *Sherman* v. *United States,* 356 U.S. 369; *Sorrells* v. *United States,* 287 U.S. 435. This Court recently rejected the contention that the participation of a government agent in the operational elements of a conspiracy amounts to a violation of due process. *United States* v. *Russell,* No. 71-1585, decided April 24, 1973.

6. Petitioners raise various search and seizure issues; none has merit.

a. Petitioners contend that Durden's activity collecting evidence as a government agent both by his direct

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[7] Petitioner Ted Butler also complains (Pet. 40-41) that the judge's instruction that amphetamine is a "stimulant" and barbiturate is a "depressant" within the terms of 21 U.S.C. (1964 ed., Supp. V) 360a denied him a jury trial. Clearly, however, this was a matter of law on which the judge could instruct the jury. It still remained for the jury to determine whether petitioners had conspired to possess or had sold such drugs.

observation and by his telephone conversations with the defendants amounted to illegal searches and seizures. As the court of appeals held (Ted Dean Butler Pet. App. A, pp. 2-3), however, statements and acts made in furtherance of a crime are not protected from direct observation by government agents or from electronic recording in telephone conversations with the consent of a party. 18 U.S.C. 2511(2)(d); *United States* v. *White,* 401 U.S. 745; *Hoffa* v. *United States,* 385 U.S. 293; see *United States* v. *Russell,* No. 71-1585, decided April 24, 1973; *People* v. *Canard,* 65 Cal. Rptr. 15, 29; *People* v. *Cruz,* 85 Cal. Rptr. 918; *People* v. *Caravella,* 85 Cal. Rptr. 576. Nor do the rights to *Miranda* warnings or assistance of counsel attach prior to arrest, while a crime is still being committed. Similarly there was no violation of *Massiah* v. *United States,* 377 U.S. 201, in these preindictment overhearings.[8]

b. Petitioners contend that the admission into evidence of a telephone number of Robert Butler and Charles King and some amphetamine residue, all found by federal agents in Leo Lovato's trash, and also a ledger seized at the time of Leo Lovato's arrest containing information about the distribution of drugs and narcotics to the defendants was error.[9] But as the court below

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[8] Additionally it was not error, as petitioners assert (Ted Dean Butler Pet. 40), to allow the jury to hear Durden's comments along with the defendants' statements in their conversations. As the court below noted, for the judge to have excised all of Durden's half of the discussions would have rendered the recorded conversations which were legitimate evidence, unintelligible (Ted Dean Butler Pet. App. A, p. 4).

[9] On February 6, 1970, federal agents arrested Leo Lovato. In the garage attached to the residence, they found 20,000 amphetamines in boxes in Lovato's car and in a footlocker (R.T. 1322-1325, 1352). They also found two ledger books in the foot locker and scraps of paper (R.T. 1323, 1330-1331). The location of these drugs had been pointed out to the officers by Leo Lovato.

ruled (Ted Dean Butler Pet. App. A, p. 7), petitioners lacked standing as persons aggrieved to object to the searches and seizures of the ledgers. *Alderman* v. *United States,* 394 U.S. 165. Moreover, the ledgers, which were found in Lovato's possession at the time of his arrest, contained accounting entries made during the course of the conspiracy. Since these entries were made in furtherance of the scheme, they were admissible against Lovato's co-conspirators. *United States* v. *Garelle,* 438 F. 2d 366, 369-370 (C.A. 2); *United States* v. *Bennett,* 409 F. 2d 888, 895, n. 6 (C.A. 2), certiorari denied, 396 U.S. 852, 402 U.S. 984.[10] Although the scraps of paper from Lovato's trash did not qualify under this rationale, nevertheless the court below correctly found that in view of other evidence in this case their admission was harmless (Ted Dean Butler Pet. App. A, p. 14). Moreover, petitioners do not explain how these papers may have prejudiced them.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[10] The admission into evidence of such statements made in furtherance of a conspiracy by a non-testifying co-conspirator does not violate the right to confrontation. *Delaney* v. *United States,* 263 U.S. 586, 590; *United States* v. *Nall,* 437 F. 2d 1177 (C.A. 5); *United States* v. *McGann,* 431 F. 2d 1104 (C.A. 5), certiorari denied *sub nom. Pruitt* v. *United States,* 401 U.S. 919; cf. *Dutton* v. *Evans,* 400 U.S. 74.